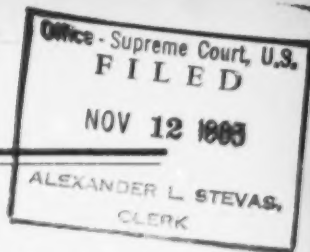


83 - 799

NO.



**In the
Supreme Court of the United States**

OCTOBER TERM, 1983

DENNIS J. LEWIS,

PETITIONER

VERSUS

BROWN & ROOT, INC.

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

**HORACE R. GEORGE
4720 DOWLING STREET
HOUSTON, TEXAS 77004
713-526-5505**

**ATTORNEY FOR
PETITIONER**

QUESTIONS PRESENTED

1. Whether the district court has the power to award attorney's fees against plaintiff and against plaintiff's attorney for the entire amount of the attorney's fees, in an employment discrimination action, where the findings of fact of the district court fails to include a finding that plaintiff's action was frivolous, unreasonable and without merit, and a finding that the action of plaintiff's attorney multiplied the proceedings in an unreasonably and vexatiously manner.

2. Whether the district court has the power to award attorney's fees against plaintiff and against plaintiff's attorney for the entire amount of the attorney's fees and against plaintiff and against plaintiff's attorney after the expiration of ten days after entry of judgment and after the plaintiff files a notice of appeal.

3. Whether the district court should have dismissed plaintiff's action before plaintiff rested and completed his case.

4. Whether the district court has the power to dismiss an employment discrimination action, upon the merits, where plaintiff has established a prima facie case, and there was not produced a legitimate non-discriminatory reason for the action of the employer.

5. Whether the district judge has the power to dismiss an employment discrimination action, for want of prosecution, where no reference to a dismissal for want of prosecution is made in the oral decision of the district judge or in the final judgment where plaintiff has established a prima facie case.

6. Whether the district judge should recuse himself where after an exchange of cases, and after a substitution of his former law firm as attorney for a party in the action in his court before trial, and his actions during and after trial indicate a lack of an appearance of impartiality.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Dennis J. Lewis, Petitioner

Brown & Root, Inc., Respondent.

/S/ HORACE R. GEORGE

HORACE R. GEORGE

Attorney of Record for Petitioner

4720 Dowling Street

Houston, Texas 77004

713-526-5505

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Interested Parties	iii
Table of Contents	iv
Table of Authorities	v
Opinion Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	4
Reasons For Granting the Writ	7
Conclusion	17
Certificate of Service	18
Appendix A	A-1
Appendix B	A-22
Appendix C	A-25
Appendix D	A-26
Appendix E	A-27
Appendix F	A-31
Appendix G	A-41
Appendix H	A-43

TABLE OF AUTHORITIES

Case:	Page
<i>Christiansburg Garment Co. v. EEOC</i> , 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 648 (1978)	9
<i>El-Amin v. Williams</i> , D.C. Va. 1981, 92 F.R.D. 454	11
<i>Fase v. Seafarers Welfare and Pension Plan</i> , D.C. N.Y. 1978, 79 F.R.D. 363	11
<i>Fine v. Paramount Pictures</i> , C.A. Ill. 1950, 181 F.2d 300	11
<i>Glass v. Pfeffer</i> , C.A. Ill, 1981, 664 F.2d 252	11
<i>Marks v. Philadelphia Wholesale Drug Co.</i> , D.C. Pa. 1954, 125 F.Supp. 369	11
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 668	8, 13
<i>Monk v. Roadway Express, Inc.</i> , 599 F.2d 1378, 1381	12
<i>Munich v. U.S.</i> , C.A. Cal. 1964 350 F.2d 774	11
<i>Ramsay v. Bailey</i> , 531 F.2d 706 (5th Cir. 1976) cert. denied, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977)	10, 15
<i>State of New York v. Nuclear Regulatory Commission</i> , (C.A. 2d 1979) 550 F.2d 745, 22 F.R. Serv. 2d 1476	12
<i>Texaco, Inc. v. Chandler</i> , CA Okl. 1965, 354 F.2d 655, certiorari denied, 80 S.Ct. 1066, 383 U.S. 936, 15 L.Ed.2d 853	16
<i>Texas Dept. of Community Affairs v. Burdine</i> , 450 U.S. 248, 67 L.Ed. 207, 101 S.Ct. 1098	13
<i>Turner v. Ohman House Corp.</i> , C.A. Tenn. 1967, 376 F.2d 347	11
<i>United States v. Hitchmon</i> , (C.A. 5th 1979) 58 F.2d 1357	12, 15

Statutes:

28 U.S.C.A. 455	4, 16, 17
28 U.S.C.A. 1254(1)	3, 2
28 U.S.C.A. 1927	4, 10
42 U.S.C.A. 1981	2, 17
42 U.S.C.A. 2000(e)2	2

Rules:

Rule 3, Fed. Rules App. Proc., 28 U.S.C.A.	12
Rule 52(b) Fed. Rules of Civ. Proc., 28 U.S.C.A.	3, 11
Rule 59(e) Fed. Rules of Civ. Proc., 28 U.S.C.A.	3, 11

Other Authorities:

9 <i>Moore's Federal Procedure</i> 203.11	12, 15
---	--------

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DENNIS J. LEWIS,

PETITIONER

V.

BROWN & ROOT, INC.

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A writ of certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals Appendix A is reported at __ F.2d __.

There is no formal opinion of the District Court. Excerpts of the transcript in that Court, including the judge's statement in dismissing the case are reproduced in Appendix F to this Petition.

The order of the District Court granting motion for an award of attorney's fees is reproduced as Appendix D. The order and opinion of the court setting the amount of the attorney's fees is reproduced as Appendix E.

JURISDICTION

The judgment of the Court of Appeals (App. G, *infra*, A-41-A-42) was entered on August 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C.A. 1981 provides:

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

42 U.S.C.A. 2000(e) 2 provides:

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race,

color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 59(e) Federal Rules of Civil Procedure, 28 U.S.C.A. provides:

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948;¹ Feb. 28, 1966, eff. July 1, 1966.²

28 U.S.C.A. 1254(1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Rule 52(b) Federal Rules of Civil Procedure Provides:

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may there-

after be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment. As amended Dec. 27, 1946, eff. March 19, 1948,¹ Jan. 21, 1963, eff. July 1, 1963.²

28 U.S.C.A. 1927 provides:

§ 1927. Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. As amended Sept. 12, 1980, Pub.L. 96—349, § 3, 94 Stat. 1156.

28 U.S.C.A. 455

STATEMENT OF THE CASE

Petitioner, age 29, filed a charge of discrimination against respondent charging he was discriminated against in the delay in his rehiring by respondent. Petitioner was employed as a pipefitter by respondent, a large Texas construction corporation. Petitioner is black and had a non-minority employee of respondent, Randall Karm, working with him as his pipefitter helper. Karm was under the supervision of petitioner in his work as petitioner's helper. On January 12, 1980 Petitioner and Karm were fired for being engaged in horseplay by Tommy Spurgeon, a supervisor over petitioner and Karm. Although petitioner denies he was engaged in horseplay, at no time has he made a charge or claim that his discharge was discriminatory.

Petitioner and Karm were treated alike since they were both fired. Tommy Spurgeon and Walter L. Taylor, supervisors of petitioner and Karm, promised them they would be rehired in thirty days. Karm was rehired on February 13, 1980 and petitioner was not rehired until November 4, 1980. Petitioner applied to be rehired on February 12, 1980 but was rejected by Carney, respondent's agent and employee in charge of its personnel office. All of the individuals involved in this action are non-minority except petitioner. Petitioner's charge was based on the delay in his rehiring. Petitioner claimed he lost approximately \$10,000.00 by respondent rehiring Karm in February 1980 and waiting until November, 1980 to rehire petitioner. The EEOC issued petitioner a Notice of Right To Sue dated April 23, 1980.

Walter L. Taylor, one of petitioner's supervisors, gave petitioner a written statement petitioner was to be rehired on February 12, 1980. Petitioner had been fired and rehired several times before and several times after the incident of January 12, 1980. The ugly picture of discrimination emerges, according to petitioner, when it came time for him to be rehired on February 12, 1980. Respondent's promise to the non-minority was honored and respondent's promise to petitioner was not honored. Petitioner claimed he was better qualified than Karm since he was the pipefitter and Karm was his pipefitter's helper. The respondent had a policy of hiring, firing, rehiring, and laying off petitioner and others. The question is not that respondent rehired petitioner in November, 1980, but the question is the failure to rehire petitioner on or about February 12, 1980. Petitioner filed his original complaint on August 5, 1980, in the United States District Court for the Southern District of Texas. Trial of this action was started by the district court around 10:15 a.m. on April 21, 1982. The

Court took its noon recess at 12:45 p.m. until 1:30 p.m. according to the Court Reporter's original certified transcript, Appendix F Tr. 72. The noon recess took place around 12:20 p.m. and the petitioner and his counsel were present in the courtroom prior to 1:00 p.m. and at about 1:30 p.m. the clerk of the district judge came into the courtroom and informed plaintiff and his counsel the case had been dismissed. Prior to leaving the courtroom the court personnel of the district court were asked to inform the district judge the plaintiff and his counsel may be a few minutes late getting back from the fifteen minutes noon recess. At some time on April 21, 1982 the district court orally dismissed the petitioner's action on the merits. (Appendix F, Tr. 72-73). Petitioner and attorney were not present when the case was dismissed. No mention was made by the district court that the action was dismissed for want of prosecution. The final judgment of the district court was entered on April 23, 1982. The court dismissed the petitioner's action upon the merits. No mention is made by the district court in its final judgment that the action was dismissed for want of prosecution. The final judgment was not amended.

The findings of fact and conclusions of law and final judgment were entered by the district court on April 23, 1982. No mention was made to amend the findings of the judgment at any time. Petitioner and his attorney were not present at the time the district Judge dismissed this action. On May 7, 1982 respondent filed a motion for attorney's fees in the amount of \$6,000.00. On June 14, 1982 the district court granted defendant's motion for an award of attorney's fees but withheld assessing the amount of attorney's fees. On August 18, 1982 the district court made an order setting the amount of attorney's fees as \$2,500.00 and made certain findings of fact. The entire amount of the

attorney's fees were awarded against plaintiff's attorney as well as against the plaintiff. No motion was made for an extension of time to award costs or attorney's fees. At no time did the district court state it was retaining jurisdiction for any purpose. Petitioner, filed his notice of appeal on May 19, 1982. On August 18, 1982 the district court made its finding that petitioner's action was frivolous, unreasonable and without foundation and that the action of petitioner's attorney multiplied the proceedings in an unreasonably and vexatiously manner and granted respondent an award of attorney's fees. No evidentiary hearing was held on the motion for an award of attorney's fees. In November, 1982, the district court granted a motion of respondent to correct the record wherein the court reporter previously had certified the record that the noon recess was from 12:45 to 1:30. Petitioner and his attorney were not present until around 12:50 p.m. and have no knowledge of what transpired at the time the district court dismissed this action. On August 28, 1983, Respondent submitted a bill of cost and a motion to the court of appeals for attorney's fees and double costs.

REASONS FOR GRANTING WRIT

This case presents important questions regarding the personal liability of attorneys and parties in civil rights litigation. It may have serious consequences with respect to enforcement of civil rights legislation. The district court made an award of attorney's fees against plaintiff's attorney for the entire amount of the awarded attorney's fees. There was no finding in the findings of fact and conclusions of law that plaintiff's attorney unreasonably and vexatiously multiplied the proceedings. There was no finding in the findings of fact and conclusions of law that the action was frivolous, unreasonable and without foundation.

The court of appeals ruling does not follow *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed 668 with regard to presumptions. The ruling allows the harsh action of a dismissal on the merits of a civil rights action without allowing plaintiff to rest or complete his case. Furthermore, the court of appeals held that a dismissal for want of prosecution was warranted. There was no mention of a dismissal for a want of prosecution in the oral decision of the district court or in the entered final judgment.

In an indication of the importance of this case, Judge Tate said the following in his dissenting opinion:

"In summary the *Christiansburg* reasons that prevent an award of his opponent's attorney's fees against a civil rights claimant, lest it merely *inhibit* his access to the courts, even more urgently apply against imposing personal liability for such fees upon his unsuccessful attorney who had assured his access to the courts, lest such a principle totally *deprive* the civil rights claimant of access to the courts."

(Emphasis courts)

Furthermore Judge Tate said:

"Moreover to assess attorney's fees against the civil rights claimant is egregiously wrong under present facts, where the court-ordered truncation of his full case may have deprived him from presenting on re-direct examination an explanation that the supervisor's "personal" animus may have had a colorable racial motivation."

The court of appeals concluded that delay in rehiring did not stem from racial bias because a personal grievance

was a legitimate non-discriminatory reason for inaction of employer. The employee in charge of the personnel office who told petitioner he would not be rehired and caused the delay in his rehiring did not have a personal grievance against petitioner. The employee in the office who may have had a personal grievance against petitioner was not the agent of employer responsible for the action that resulted in the employment discrimination claim. A personal grievance as a legitimate non-discriminatory reason for the action of an employer would have far ranging effect especially where you are imputing the personal grievance of one employee to the action of another employee. The court of appeals ruling ignores that the agent of the employer in charge of the personnel office was the one responsible for the action of the employer.

1. A divided court of appeals affirmed the district court's decision. Judge Tate dissented, in part, on the grounds that the award of attorney's fees against the petitioner violated the principles laid down by *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 648 (1978) It stated as follows:

"In sum a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation even though not brought in bad faith."

In its findings of fact and conclusions of law entered on April 23, 1982 the district court made no finding that the plaintiff's action was frivolous, unreasonable or without foundation. As a result of this omission the district court could not make an award of attorney's fees since essential elements were not found in its findings of fact.

Judge Tate concluded:

"From the previous description of the litigation it appears plain to me that the plaintiff Lewis's suit was not 'frivolous, unreasonable or groundless' in the *Christiansburg* sense".

The district court did not find in its findings of fact and conclusions of law that the action of the plaintiff's attorney multiplied in an unreasonably and vexatiously manner the proceedings. Without such a finding the award against plaintiff's attorney could not be made. 28 U.S.C. 1927 is strictly construed. *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir. 1976) *cert. denied* 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977)

Regarding the strict construction of 28 U.S.C. 1927 Judge Tate in his dissent said:

"The Court also affirmed, 447 U.S. at 767, 100 S.Ct. at 2465, the earlier ruling of this court, 599 F.2d 1378, that the civil rights plaintiffs' attorneys were personally liable under § 1927. There, *inter alia*, we had pointed out that "§ 1927 should be strictly construed because it is penal in nature", 599 F.2d at 1382, and we had held that "§ 1927 provides only for *excess* costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation." 599 F.2d at 1383 (emphasis the Court's).

In my view, the majority offends these principles in at least two respects. First, affording a strict construction to the statute in the light of its purposes as reflected by its legislative history, a claimant's attorney should not be penalized by personal liability for his opponent's attorney's

fees simply because the attorney assured the claimant his day in court; and especially not when the skeletal facts presented a prima case of racial discrimination in a civil rights complaint. Second, if the attorney is to be penalized for unreasonable and vexatious actions in the conduct of the suit, his personal liability for the opponent's attorney's fees should be limited only to the *excess* costs so occasioned; he should not be liable for the opponent's total attorney's fees incurred in defending the claim on the merits."

2. The motion for an award of attorney's fees against plaintiff was made fourteen days after entry of judgment. The final judgment was entered on April 23, 1982. And the motion for an award of attorney's fees is a motion to alter or amend a judgment and must be brought within ten days of the entry of judgment. *El-Amin v. Williams*, D.C. Va. 1981, 92 F.R.D. 454; *Glass v. Pfeffer*, C.A. Ill. 1981, 664 F.2d 252, *Fase v. Seafarers Welfare and Pension Plan*, D.C. N.Y. 1978, 79 F.R.D. 363. A motion to amend or alter a judgment or make additional findings must be served within ten days of the entry of judgment. *Turner v. Ohman House Corp.*, C.A. Tenn. 1967, 376 F.2d 347, *Munich v. U.S.*, C.A. Cal. 1964 350 F.2d 774; *Fine v. Paramount Pictures*, C.A. Ill. 1950, 181 F.2d 300; *Marks v. Philadelphia Wholesale Drug Co.*, D.C. Pa. 1954, 125 F.Supp. 369. Federal Rules of Civil Procedure Rule 59(e), 52(b), 28 U.S.C.A. The district court's findings of fact and conclusions of law and final judgment were entered on April 18, 1982. In the district court's order dated August 18, 1982, setting the amount of the attorney's fees, for the first time there is a finding that the action was frivolous, unreasonable and without foundation.

The district court did not retain jurisdiction to award

attorney's fees after it dismissed this action. *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1381. Notice of appeal was filed on May 19, 1982 and the district court granted defendant's motion for an award of attorney's fees on June 14, 1982 and set the amount of the attorney's fees on August 18, 1982. After the notice of appeal was filed the district court lost jurisdiction. The filing of a notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals. *United States v. Hitchmon*, (C.A. 5th 1979) 58 F.2d 1357; *State of New York v. Nuclear Regulatory Commission*, (C.A. 2d 1979), 550 F.2d 745, 22 F.R.Serv. 2d 1476, 9 *Moore's Federal Procedure* 203.11, Federal Rules App. Proc. Rule 3, 28 U.S.C.A.

3. The petitioner was not allowed his day in court. Judge Tate stated in his dissent:

"The attorney had assured Lewis access to the courts, to secure judicial redress for him for what on its face seemed *blatant* racial discrimination in rehiring the white assistant, but refusing to rehire the black plaintiff, where both had been discharged for simultaneous and joint misconduct." (Emphasis added).

If petitioner had been allowed to complete his case the petitioner would have shown more clearly it was Carney, not Petty, who was the agent of respondent who refused to rehire petitioner on February 12, 1980. Furthermore, it would have been shown that other non-minority employees under the same circumstances, besides Karm, were rehired as expressly promised by respondent.

4. The dismissal of this action upon the merits was not warranted since petitioner established and proved a

prima facie case. In accordance with the objective guideline set out in *McDonnell Douglas Corp. v. Green, supra*, petitioner established a prima facie case.

The district court found that petitioner was black; applied to be rehired; was rejected and that the position was filled by the employer. It is undisputed the position was filled by a non-minority and the attorneys for the respondent stipulated petitioner was qualified. (Appendix F, Tr. 6, 7) Petitioner established a prima facie case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed. 207, 101 S.Ct. 1098. By establishing a prima facie case the petitioner created a presumption that the respondent was unlawfully discriminating against petitioner. Without a non-discriminatory reason for the reason for the refusal to rehire petitioner the district court should have entered judgment for petitioner if it was going to decide the case on the merits. *Texas Department of Community Affairs v. Burdine, supra; McDonnell Douglas Corp. v. Green, supra*.

In addition to supplying a legitimate non-discriminatory reason why it did not rehire petitioner at the same time it did Karm, respondent, it seems, by making an express promise to rehire petitioner on a certain date should also produce a legitimate non-discriminatory reason why its expressed promise was not kept with its non-minority employee.

The district court and the majority in the court of appeals held there was no discrimination in rehiring because the petitioner was rehired. Petitioner makes no contest or claim that he was not rehired at all. The petitioner's complaint is that his helper was given preference over him by being rehired when respondent promised he would rehire

him. The petitioner, a black person, was not rehired as promised. The difference in the time element of the rehiring constitutes the disparate treatment.

The court of appeals decided that the delay in rehiring petitioner was not the result of racial bias because Petty, one of respondent's agents and employees, had a personal grievance against petitioner. Carney, was the agent and employee of the respondent who refused to rehire petitioner. Carney's motive was not produced at the trial by the respondent. Any personal grievance Petty may have or may not have against petitioner does not alter or change respondent's obligation to not discriminate in its employment practices.

The person who told petitioner there was no job for him was Carney. Appendix F, Tr. 30, 59, 60, 61. What went on between Petty and Carney is speculation since no one testified on behalf of respondent at the trial. Carney's motives are unknown. Carney told the respondent that Jack Laswell, the project manager said not to rehire petitioner. Jack Laswell's motives are unknown. It was Carney who should supply a legitimate non-discriminatory reason for his action. Imputing Petty's personal grievance should not supply a sufficient non-discriminatory reason because the respondent rehired the petitioner in November, 1980. Petty's personal grievance in February did not prevent respondent from rehiring petitioner in November, 1980. This strongly indicates a personal grievance was not a factor in failing to rehire petitioner in February, 1980. Petitioner's employment record was not a factor in failing to rehire him in February, 1980. Petitioner was hired and fired several times before and several times after the incident in question by respondent. The district court stated in its findings that "Apparently Taylor had either changed his

mind or more likely merely forgotten to ask the personnel office to rehire Plaintiff." There is no evidence in the record to support this statement. Taylor did not testify at the trial.

5. The majority in the court of appeals held that dismissal of the action for want of prosecution was warranted. Judge Tate in his dissenting opinion disagreed with this conclusion. Dismissal for want of prosecution is a harsh sanction, especially in an action such as this where petitioner and his attorney had no intention of being late returning to the trial of this action. A fifteen noon recess is short. The trial of this action would probably not have taken longer than another hour to complete. At the time it was dismissed by the district court the trial had lasted two hours and five minutes. A trial of three hours does not seem a long time even if it is not a serious matter as the majority in the court of appeals implied. A loss of \$10,000.00 in earnings is a serious matter to petitioner. Dismissal for want of prosecution should be used sparingly. *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir. 1976) *cert. denied*, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977).

The appeal was from the final judgment of the district court. The final judgment and the oral decision dismissing this case are silent with respect to any mention on dismissal for want of prosecution. The final judgment dismissed the action of the merits. Dismissal for want of prosecution was not a part of the final judgment.

The effect of a timely filed appeal is to immediately transfer jurisdiction to the court of appeals, 9 *Moore Federal Practice* §203.11 at 734. *United States v. Hitchmon*, (C.A. 5th. 1979) 587 F.2d 1357.

6. A district judge should not only be impartial but also give the appearance of impartiality. *Texaco, Inc. v. Chandler*, CA Okl. 1965 354 F.2d 655, *certiorari denied*, 80 S.Ct. 1066, 383 U.S. 936, 15 L.Ed.2d 853, 28 U.S.C. 455. The district judge exchanged cases CAH 80-2432, H-81-1171 and H-81-1177 for this case. On April 8, 1982, the district judge's former law firm was substituted as attorneys for respondent. The district judge had been associated with the substituted attorneys.

The harsh action of dismissing this case upon the merits because of unintentional absence of petitioner and his attorney, for being a few minutes late, returning from a fifteen minutes noon recess; the failure to give consideration to a request communicated to the district judge's court personnel for a few minutes extension of the fifteen minute noon recess; dismissing this case without giving petitioner an opportunity to rest; the awarding of attorney's fees against petitioner without making a finding of fact that the action was frivolous, unreasonable and without foundation; granting an award of attorney's fees against the attorney for petitioner without making a finding in district judge's finding of fact that the actions of the attorney multiplied unreasonably and vexatiously the proceeding; making the award of attorney's fees after notice of appeal to the circuit court; making findings more than ten days after entry of judgment; making another set of findings of fact about three months after entry of the original findings of fact and conclusions of law and final judgment; making a finding in the district judge's order dated August 18, 1982, that petitioner was not qualified and the attorneys for respondent had stipulated petitioner was qualified; making the award of attorney's fees against plaintiff's attorney for the entire amount of the attorney's fees; making the award of attorney's fees without an

evidentiary hearing; all of the above factors point to a lack of the appearance of impartiality of the district judge in violation of 28 U.S.C.A. 455.

All of the above statements applies to petitioner's claim under Title VII of the Civil Rights Act and 42 U.S.C. 1981.

CONCLUSION

For the reasons set forth above, the petitioner respectfully requests that this petition for a writ of certiorari be granted and that the Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

Horace R. George
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon opposing counsel Vinson and Elkins, First City Tower, Houston, Texas, 77002, by depositing same in the United States Mail, first class postage prepaid, on this the 11th day of November, 1983.

HORACE R. GEORGE
Attorney for Petitioner
4720 Dowling Street
Houston, Texas 77004
713-526-5505

A-1

APPENDIX "A"

Dennis J. LEWIS,
Plaintiff-Appellant,

v.

BROWN & ROOT, INC.,
Defendant-Appellee.

No. 82-2217.

United States Court of Appeals,
Fifth Circuit

Aug. 15, 1983

Employee brought civil rights action against employer. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., entered an order dismissing action, and employee appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) evidence, including subsequent repeated rehires of employee, was sufficient to support finding that neither employee's discharge nor delay in his rehiring stemmed from racial bias, warranting dismissal of action; (2) dismissal of action for want of prosecution was warranted; (3) award of \$2,500 attorney fees against plaintiff was not clearly erroneous; and (4) joint award of attorney fees against plaintiff's counsel was not clearly erroneous.

Affirmed.

Tate, Circuit Judge, concurred in part, dissented in part, and filed an opinion.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, GARZA and TATE, Circuit Judges.

GEE, Circuit Judge:

The record in this case paints a convincing picture of the sort of civil rights action that should never have been filed.

Plaintiff Dennis J. Lewis is a thirty-year old black native and citizen of Trinidad, W.I. He had two years of schooling there to become a pipefitter and served an apprenticeship in that trade at the Shell Chemical plant in Trinidad. In 1976, at the age of twenty-three, we find him at work in Texas for defendant Brown & Root as a pipefitter's helper. In December of that year he was discharged for absenteeism. Between then and the year 1980, he was rehired and released four times by Brown & Root as a pipefitter or pipehanger. One of these releases resulted from a reduction of force; three times he was fired—twice for disobedience to instructions and once for incompetence.

On January 14, 1980, having again been rehired, he was discharged for loafing. This occasion gave rise to the present legal action. Since then, he has been reemployed by Brown & Root four times and released, three times in a reduction of force and once for insubordination. In August of 1980, between stints with Brown & Root, he filed this action claiming that he was a United States citizen, that he had not been discharged for loafing on January 14, 1980, and that he had been discharged and not later rehired

because he was black.¹ In addition to other claims for relief, he prayed that Brown & Root be required to give him "training and other assistance as necessary to enable the Plaintiff to overcome the effects of past discrimination,"² be required to institute "an active recruitment policy," and so on.

The progress of Mr. Lewis's action has not been such as to signify great seriousness. Six weeks after it was filed, the defendant noticed Lewis's deposition for October 8, 1980. Thereafter, for his counsel's convenience and at his request, it was by agreement reset for October 14. Neither Lewis nor his counsel appeared at the appointed time on October 14, and, in consequence, Brown & Root moved for dismissal of the case, default judgment, and other sanctions. Action on that motion was forestalled, however, by a superseding default on the part of plaintiff's counsel; though duly notified of a November 2 docket call, neither plaintiff nor his counsel appeared and the case was dismissed for want of prosecution. A motion to reinstate, filed on November 5, sought indulgence on the ground of counsel's "mistake, inadvertence and failure to properly record the date of the Docket Call" On December 30, 1981, it was granted.

The action was set for trial at 9:30 A.M. on April 21, 1981. Trial was delayed for forty-five minutes because Lewis, the sole plaintiff's witness, failed to appear until

¹ In April, the EEOC issued Lewis his Notice of Right to Sue, noting that "No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination."

² Presumably suffered by him in Trinidad, since he had been working for Brown & Root off and on, at advancing pay scales, during most of his adult life.

10:15 A.M. It then commenced, and Mr. Lewis's testimony was heard until 12:20 P.M. At that time, counsel for Lewis requested a recess. One was granted, of fifteen minutes duration—until 12:35 P.M. At that time the court reconvened. Neither Lewis nor counsel appeared. After awaiting their appearance for fifteen minutes, the court dismissed Lewis's case.

Before the recess, Lewis's counsel had advised the court that Lewis would be his sole witness and, cross-examination having been completed, that he would require only a short redirect to complete his case. So far as the record shows, neither Lewis nor his counsel ever appeared again after the recess. Counsel for Lewis maintains on brief and at argument that he had other matters to attend to during the customary lunch break, that he informed a courtroom attendant that he might be "a couple of minutes late" in returning from the fifteen-minute recess, and that when he returned half an hour late the courtroom was empty and he was later advised that his case had been dismissed.

Indeed it had, both as supported by no evidence of racial animus and for want of prosecution. Mr. Lewis appeals from the dismissal, as well as from the court's award of \$2,500 attorney's fees against him and his attorney, jointly and severally, on the basis of 28 U.S.C. § 1927 and the authority of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (42 U.S.C. § 2000e—5(k)). At oral argument before us, Lewis's counsel explained that he had other business to transact during the recess and that he returned as soon as that had been attended to. He also maintained that he established a prima facie case of discrimination by the testimony of his client and that, given this, neither the dismissal of the case nor

the award of attorney's fees can be viewed as proper. We disagree and affirm both aspects of the decision.

A dismissal based on the failure of plaintiff to prove an essential element of his case normally would be improper if entered before plaintiff had completed the presentation of his evidence. Here, decision was rendered after plaintiff had presented all his witnesses—consisting of roughly two hours of plaintiff's testimony—and after the defense had completed its cross-examination. It is true that Lewis's counsel advised the court that he wished a few more minutes for redirect. It is also true, as we have seen, that he requested a 15-minute recess and did not return when the court reconvened at the designated time, nor were he or his client to be found when the court dismissed the case another 15 minutes later. We find, in the circumstances of this case, that through his actions Lewis's counsel had waived his opportunity to conduct redirect. With no witnesses left to call, the district court properly considered plaintiff's case closed and dismissed the case based on Lewis's failure to prove a discriminatory motive.

Our survey of the record amply bears out the court's conclusion that Lewis offered no evidence that either his discharge or the delay of some ten months before he was rehired resulted from racial bias.³ Both Lewis and his

³ Appellant objects to dismissal for failure to adduce evidence of racial animus because, he asserts, he had established a prima facie case and defendant had not articulated a legitimate nondiscriminatory reason for the decision not to rehire. See *Jackson v. City of Killeen*, 654 F.2d 1181, 1183 (5th Cir.1981) (relying on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), as clarified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). We reject this argument; appellant misunderstands the decision below. The evidence supporting defendant's nondiscriminatory reasons was offered by plaintiff himself, during his trial testimony. See Tr. 29; 44-45. Moreover, *McDonnell*

white helper, caught wrestling over a bicycle during work hours, were discharged. Let Lewis's testimony settle the matter:

Q. Now, you didn't tell the EEOC that you were discharged because of your race, because you knew you were not discharged because of your race, didn't you?

A. I was discharged because Mr. Spurgeon [a supervisor] thought he was doing the right thing as a superior. He saw two people in a situation and he was doing what was best for him to do as a superior, someone in responsibility. He told me he eliminated both parties. (Tr. 44-5).

The same is true of the failure to rehire Lewis though his discharged white helper was rehired in thirty days. When Lewis reported to reapply, he was surprised to find a Mr. Petty, with whom he had had an earlier dispute over whether Lewis should be the driver of a van pool, receiving

(Footnote 3 continued)

Douglas represents merely a division of evidentiary burdens, and, in the words of the Supreme Court, "[t]he ultimate burden of persuading the trier of fact that a defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. Finally, plaintiff had not presented any evidence that the defendant's nondiscriminatory reasons were a mere pretext. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978).

Thus, the dismissal on the merits below properly respected the burdens of proof established for this type of case. See also *United States Postal Service Board of Governors v. Aikens*, — U.S. —, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403, 409 (1983). "Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms they have unnecessarily evaded the ultimate issue of discrimination vel non." (footnote omitted)

the applicants. Again, Lewis's own testimony is dispositive:

Q. Would you tell the court what you're trying to say about Mr. Petty?

A. Yes, sir. I believe that my discrimination started right there from Mr. Petty that morning ... on February 12, Because Mr. Petty had a *personal* grievance against me because I went to the project manager [higher authority] about the van pool." (Tr. 29) (emphasis supplied)

The above and other evidence in the record—such as the subsequent repeated rehires of Lewis—amply bear out the trial court's findings that neither Lewis's discharge nor the delay in his rehiring stemmed from racial bias. We therefore affirm the district court's finding of no discrimination under the clearly erroneous standard of *Pullman v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

Moreover, as will be apparent from the remainder of our opinion, we also conclude that the conduct of Lewis and his counsel afforded an ample foundation for the other ground of the court's dismissal order: want of prosecution. From its inception, the conduct of this action by both Lewis and his counsel evidenced a careless disregard for both court and opposing counsel bordering on the insolent. The action was commenced by a pleading which was inaccurate even as to Lewis's citizenship and which asserted acts of discrimination which found no basis in Lewis's eventual testimony in court. Thenceforth it proceeded through a failure of Lewis's counsel and the refusal of Lewis to appear at a deposition specifically rescheduled to meet their convenience to its first dismissal for want of

prosecution, occasioned by the failure of counsel to attend a docket call of which he admittedly had notice. Reinstated and set for a day and hour certain, its commencement was delayed forty-five minutes while the court awaited the arrival of plaintiff's sole intended witness, Lewis himself.

There then followed two hours of testimony by Mr. Lewis in which, despite an occasional early and conclusory suggestion that he had been subjected to racial discrimination, he candidly and specifically attributed his discharge to the racially evenhanded enforcement of a valid rule against horseplay and the delay in his rehiring to the personal dislike borne him by a supervisor, stemming from an earlier incident between them which had nothing to do with race. Granted a fifteen-minute recess to prepare to conclude their case, counsel and client returned forty minutes later (so it is claimed) to find that the court had awaited their return for fifteen minutes past the time appointed and dismissed the case a second time for want of prosecution as well as for lack of evidence.

Our review of a dismissal for want of prosecution is limited to inquiring whether the district court abused its discretion. *Lopez v. Aransas County Independent School District*, 570 F.2d 541, 544 (5th Cir.1978). Rule 41(b) of the Federal Rules of Civil Procedure permits a dismissal for want of prosecution where there is a record of delay or contumacious conduct and an indication that the client knew of or participated in the attorney's failure to prosecute. See *Anthony v. Marion County General Hospital*, 617 F.2d 1164, 1167-69 (5th Cir. 1980); *Lopez*, 570 F.2d at 544. Although the power to dismiss for want of prosecution should be used sparingly, *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir.1976), cert. denied, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977), we think the court's action amply

justified in this case. Against a background of casual disregard of its earlier orders, the court faced the election of Lewis and his counsel to return to court, not when directed to do so, but when and if it suited them. Such protracted and repeated trifling with a busy court, burdened with a heavy docket of serious matters, need not be borne.

As for the court's award of \$2,500 attorney's fees against the plaintiff, we think its finding that Mr. Lewis's action was frivolous, unreasonable and without foundation fully justified for the reasons stated above.⁴ As the court noted in its order awarding the fees, the evidence offered by Mr. Lewis did not demonstrate, even by inference, any unlawful discrimination.⁵ As a result, the court and the defendant were subjected to a proceeding virtually if not utterly spurious, one which wasted valuable time that should have been devoted to matters of at least arguable merit.

The language of the 1964 Civil Rights Act,⁶ identical

⁴ We affirm the dismissal below on both the failure to prove discrimination and want of prosecution grounds, alternatively. As well as the decision on the substantive merits, the dismissal for want of prosecution also is "an adjudication upon the merits." Fed.R.Civ.P. 41(b); see *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 247 n. 5 (5th Cir.1980). Therefore, the dismissal for want of prosecution alone is adequate as a basis for the attorney's fee award, provided the record independently supports the finding required by the *Christiansburg* decision. See *Anthony*, 617 F.2d 1164; *Lopez*, 570 F.2d 541.

⁵ Following the *Christiansburg* standard, discussed below in text, we have sustained awards of attorney's fees to prevailing defendants where the plaintiff's claim was supported by no evidence. *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir.1980); *EEOC v. First Alabama Bank of Montgomery*, 595 F.2d 1050 (5th Cir.1979).

⁶ 42 U.S.C. § 2000e-5(k), "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs...."

as regards plaintiffs and defendants, has been differentially interpreted. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). Plaintiffs are to recover, we are told, virtually in the normal course, defendants only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421, 98 S.Ct. at 700. The trial court so found, and that finding is not clearly erroneous; this is the standard for review of such findings in our circuit. *Nilsen v. City of Moss Point*, 621 F.2d 117 (5th Cir.1980). We affirm it.

As for the joint award against plaintiff's counsel, entered pursuant to 28 U.S.C. § 1927, we also find it warranted. Here, the standard is vexatious multiplication of litigation, *id.*, and once again, the district court's resolution of that issue must stand unless clearly erroneous.⁷ On this record the district court was justified in concluding, as it did, that the entire course of proceedings was unwarranted and should neither have been commenced nor persisted in. Worse, the irresponsible *manner* in which the litigation was conducted further multiplied these needless proceedings. The district court's judgment is in all respects affirmed.

AFFIRMED.

TATE, Circuit Judge, concurring in part and dissenting in part:

⁷ *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1381 (5th Cir.1979), *aff'd in relevant part sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). In *Monk*, where this standard of review was adopted under § 1927, the statute did not provide for awards of attorney's fees. Subsequently, Congress amended the statute expressly to allow such an award. Pub.L. 96-349, 94 Stat. 1156 (codified as amended at 28 U.S.C. § 1927 (Supp. IV 1980)); this change had no effect on the standard of review.

I concur in the dismissal of the plaintiff Lewis' action, but I dissent from the award of attorney's fees against both Lewis and his counsel. In my opinion, even under the facts found by the majority, the award of attorney's fees against the claimant Lewis violates the principles laid down by *Christiansburg Garment Company v. Equal Employment Opportunity Commission*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), while the additional assessment against the plaintiff's counsel himself of personal liability for the entire defendant's fees so awarded is plainly not authorized by 28 U.S.C. § 1927, the basis for such award.

1

Initially, I must state that I have little quarrel with the majority's statements of the facts and the evidence, nor its picture of at best a marginal civil rights discrimination claim ineptly handled. However, with regard to the filing of the suit itself and bringing it to trial, we must note:

The claim of discrimination is primarily based upon the failure to re-hire the claimant Lewis after his discharge on January 14, 1980. Lewis and his white helper had been discharged on the same day for "loafing," when they were caught wrestling over a bicycle. When they exercised the company-granted right to apply for re-hiring some thirty days later, the white helper was re-employed, but Lewis, a black, was not. His suit is based upon the contention that he himself was not similarly rehired because of his race, even though the rehired white co-worker had been discharged because of the identical incident of misconduct.

Under settled principles, this established a prima facie case of discriminatory treatment, requiring the

employer to explain that the disparate treatment was not animated by race. Based upon these facts, both the plaintiff Lewis and the attorney who represented him were clearly entitled to have his claim of discriminatory treatment adjudicated by a court.

As the majority found, however, Lewis himself in his testimony testified that the "discrimination started right there", when the supervisor did not re-hire him because he "had a *personal* grievance against me because I went to the project authority about the van pool."¹ Pretermittting whether on the re-direct examination (properly held by the majority to have been forfeited due to the failure of Lewis and his counsel to reappear after a recess) Lewis might have explained the "personal" grievance as race-related because of a race-dimension to the van pool action, I do not believe that Williams himself, unlearned in the law, should be held accountable in the *Christiansburg* sense for failing to know that the blatantly different re-hiring decision as between the white helper and himself was nevertheless not actionable, since the supervisor's racially disparate treatment was not *racially* motivated.

For present purposes, it is sufficient to note the exculpatory reason for the discriminatory treatment was not shown until the trial itself—and, more, that any further effort of the plaintiff Lewis to explain race-related aspects of the discriminatory re-hiring decision was cut off by the district court's holding that his want of prosecution (failure to appear after a recess) entitled the defendant to dismissal of the action. While I concur in the majority's determina-

¹ The district court, incidentally, did not advert to or rely upon this reason in rejecting Lewis' claim—it found that the general foreman (*another* supervisory employee) had failed to re-hire him (after initially agreeing to do so) for non-racial reasons. Finding of Fact No. 3.

tion that, under the facts, this penalty of dismissal was warranted, I seriously differ with the majority's view that the further penalty of attorney's fees should be imposed against Lewis or his attorney.

2

In *Christiansburg, supra*, the Supreme Court fully discussed the functional purposes of the award of attorney's fees in civil rights litigation. Due in part to the reliance upon enforcement of the national anti-discrimination policies by private suits, "a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstance," 434 U.S. at 417, 98 S.Ct. at 698 (emphasis the Court's). However, to "assess attorney's fees *against* plaintiffs simply because they do not finally prevail ... would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." 434 U.S. at 422, 98 S.Ct. at 701 (emphasis added).

The Court concluded, *Id.*:

Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate *after* it clearly became so.

(Emphasis added.)

The Court had earlier noted, cautioning against the ready assessment of the defendant's attorney's fees against a civil rights claimant found (after full trial) to have brought a "groundless" suit,

it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22, 98 S.Ct. at 700-01.

From the previous description of the litigation, it appears plain to me that the plaintiff Lewis's suit was not "frivolous, unreasonable, or groundless" in the *Christiansburg* sense. Lewis, a black, and his white assistant were discharged because of the identical incident of misconduct. When they applied for re-employment, the white was hired, Lewis was not. Only at the trial, did it develop (from Lewis' own testimony, it is true) that the supervisor's discriminatory action against Lewis was based upon "personal" rather than racial animus. This may indeed exculpate the employer from liability for racial discrimination (even though in fact disparate racial treatment had occurred), but this merit-defense (resulting from the defendant's brief response at trial) does not convert this suit, based upon prima facie racial discrimination, to one that in the *Christiansburg* sense was without foundation when filed.

Moreover, to assess attorney's fees against the civil rights claimant is egregiously wrong under present facts, where the court-ordered truncation of his full case may have deprived him from presenting on re-direct examination an explanation that the supervisor's "personal" animus may have had a colorable racial motivation.

3

The majority also affirms the district court's award against Lewis' attorney, holding him jointly liable with Lewis for payment of the entire \$2,500 defendant's attorney's fees that had been assessed against Lewis himself. The district court did so solely on the basis of the evidence taken at the trial on the merits. Without further evidentiary hearing, it concluded that the plaintiff's attorney "should have advised Plaintiff not to proceed to trial because of the absence of proof on these issues. While a client might insist on proceeding to trial in the face of such advice, counsel for Plaintiff in this case made no effort to offer proof on these issues, even though he might have tried to do so by calling Plaintiff's supervisors as adverse witnesses to probe their motives in firing and refusing to rehire Plaintiff. In following this course, attorney for Plaintiff unreasonably and vexatiously multiplied these proceedings."

The majority's basic reason for affirmance seems to be "that the entire course of proceedings was unwarranted and should neither have been commenced nor persisted in."²

² The majority also notes that the "irresponsible manner in which the litigation was conducted further multiplied these needless proceedings." The incidents cited in the opinion are: the plaintiff and his counsel failed to appear at a deposition set for October 14, 1980; the

The reasons that strongly militate against imposing liability for the defendant's attorneys fees upon the client Lewis himself, militate even more strongly against imposing them upon Lewis' attorney. The attorney had assured Lewis' access to the courts, to secure judicial redress for him for what on its face seemed blatant racial discrimination in rehiring the white assistant, but refusing to re-hire the black plaintiff, where both had been discharged for simultaneous and joint misconduct.

If it should be argued that before filing suit the attorney should have discovered that the reason for the racially discriminatory act was a non-actionable "personal" reason rather than an actionable "racial" reason, I would note: First, we do not know from the record other than that Lewis' trial response ascribing a "personal" reason for his non-rehiring may have surprised his own counsel as much as it delighted the defendant's; the unanticipated unfavorable response by one's own client,

(Footnote 2 continued)

plaintiff failed to appear at a November 2, 1980 docket call, as a result of which the case was dismissed and then later reinstated by motion upon the plaintiff's counsel's explanation of the (careless) reasons for the default; trial was delayed for forty-five minutes when the *plaintiff* (not counsel) failed to appear timely for the merit-trial of April 21, 1981; and the plaintiff and his counsel failed to reappear after a recess at that trial. For each of these lapses other sanctions are expressly given by the procedural law; and, in fact, one sanction—the dismissal of the suit—was in fact employed.

Fully sympathizing with the exasperation and impatience of the district court with these four delinquencies of the plaintiff's counsel, I am nevertheless unable to find in 28 U.S.C. § 1927, cited in text below, any authorization of the federal judiciary to impose upon a careless or even contemptuous lawyer personal liability for the full attorney's fees of the opposing party. A different issue would have been presented, if the district court had particularized each incident and assessed attorney's fees only insofar as for that incident they were an "excess" cost of the litigation so occasioned. See 28 U.S.C. § 1927.

sometimes even after careful preparation, is a phenomenon not unknown in litigation practice. Second, because re-direct examination was forfeited, we do not know whether further testimony by Lewis might have ascribed racially tinged motivation to the supervisor's "personal" reasons for not re-hiring Lewis.³

In summary, the *Christiansburg* reasons that prevent an award of his opponent's attorneys fees against a civil rights claimant, lest it merely *inhibit* his access to the courts, even more urgently apply against imposing personal liability for such fees upon his unsuccessful attorney who had assured his access to the courts, lest such a principle totally *deprive* the civil rights claimant of access to the courts.

4

The plaintiff Lewis' attorney was assessed with

³ Even had Lewis' attorney known that his client would testify as to a "personal" reason for his discharge that, facially, was racially discriminatory, I incline to the belief that his attorney should not be subject to the sanction of personal liability himself for assuring access to the courts and judicial determination of what was at least on its face a racially discriminatory action. As *Christiansburg* notes, Congress intended to encourage access to the courts and judicial determination of claims of racial discrimination: "Congress entrusted the ultimate effectuation of that [anti-discrimination] policy to the adversary judicial process." 434 U.S. at 419, 98 S.Ct. at 699. The Congressional intent in permitting awards to civil-rights defendants was only "to protect defendants from burdensome litigation having no legal or factual basis." *Id.*, 434 U.S. at 420, 98 S.Ct. at 700 (emphasis supplied). It seems to me beyond cavil that Congress did not intend that a *defense* against a prima facie act of racial discrimination be decided in the lawyer's office (by his refusal to bring the suit, especially if inhibited by the fear of personal liability), rather than by affording the employee his day in court.

However, since under present facts there is no reason more than a naked assumption to hold that Lewis' attorney knew that the employer might prevail on this defense, I do not base this dissent upon this broader ground.

personal liability for the defendant's attorney's fees on the basis of 28 U.S.C. §1927 (as amended in 1980). This enactment provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

(Emphasis added.)

The 1980 amendment to this statute added attorney's fees and expenses to the costs for which a sanctioned attorney could be held personally liable. This amendment was in response to the holding in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) that such added non-"cost" items were not awardable within the then-terms of the statute.

Except for the added items of putative personal liability, however, the wording of the predecessor statute is identical to the present, as are the principles affecting the scope of an attorney's liability under that statute, as enunciated by the Court in *Roadway Express, supra*, and by the reviewed decision of this court, 599 F.2d 1378 (5th Cir.1979), expressly approved by the Court. The Court stated that § 1927 "is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with the abuse of court processes. Dilatory practices of civil rights plaintiffs are as objectionable as those of the defendants." 447 U.S. at 762, 100 S.Ct. at 2462. Earlier, the Court had reviewed the statutory

history, 447 U.S. at 759-762, 100 S.Ct. at 2460-61, with its general purpose of penalizing " 'unnecessary prolixity, old useless forms, and the multiplication of proceedings, and the prosecutions of several suits which might better be joined in one.' " 447 U.S. at 760, 100 S.Ct. at 2461. I might add that, although the Court does not explicitly so hold, the tenor of its discussion is that the abuse aimed at was abuse of the judicial process *after* suit is filed, *see, e.g.*, 447 U.S. at 757 n. 4, 100 S.Ct. at 2459 n. 4, not at any claimed abuse that an attorney should deprive his client of a day in court by refusing to institute suit for him.

The Court also affirmed, 447 U.S. at 767, 100 S.Ct. at 2465, the earlier ruling of this court, 599 F.2d 1378, that the civil rights plaintiffs' attorneys were personally liable under § 1927. There, *inter alia*, we had pointed out that "§ 1927 should be strictly construed because it is penal in nature", 599 F.2d at 1382, and we had held that "§ 1927 provides only for *excess* costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation." 599 F.2d at 1383 (emphasis the Court's).

In my view, the majority offends these principles in at least two respects. First, affording a strict construction to the statute in the light of its purposes as reflected by its legislative history, a claimant's attorney should not be penalized by personal liability for his opponent's attorney's fees simply because the attorney assured the claimant his day in court; and especially not when the skeletal facts presented a *prima facie* case of racial discrimination in a civil rights complaint. Second, if the attorney is to be penalized for unreasonable and vexatious actions in the conduct of the suit, his personal liability for the opponent's attorney's fees should be limited only to the *excess* costs so occasion-

ed; he should not be liable for the opponent's total attorney's fees incurred in defending the claim on the merits.

The majority rather easily states that a clearly erroneous standard of review applies to the award of attorney's fees in present circumstances. If such indeed were the clearly applicable standard, I have no hesitancy in stating my belief that the awards of attorney's fees were clearly erroneous, for the reasons previously stated.

However, whether a civil rights suit was without foundation in law or fact at the time it was instituted, so as to cause the claimant or his attorney to incur liability for an opponent's attorney's fees, is clearly in my view a mixed question of law and fact. *Cf. Washington v. Watkins*, 655 F.2d 1346, 1351-54 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 3021, 72 L.Ed.2d 474 (1982). The question presents issues that are reviewable as law-issues, insofar as they determine whether the facts reasonably found meet the requisite standard of law for assessing a civil rights claimant with his opponent's attorney's fees. I do not read *Nilsen v. City of Moss Point*, 621 F.2d 117 (5th Cir.1980), relied upon by the majority, as holding otherwise when it affirmed the *denial* of attorney's fees sought to be assessed against a civil rights plaintiff in that case.

Citing *Little v. Southern Electric Steel Co.*, 595 F.2d 998 (5th Cir.1979) and *Lopez v. Aransas County Independent School District*, 570 F.2d 541 (5th Cir.1978)—both of which had *vacated* the district court's assessment of attorney's fees against a civil rights plaintiff—, the *Nilsen* panel cursorily affirmed the denial of such an award against the *Nilsen* plaintiff. It succinctly stated that "we

cannot conclude that his finding is clearly erroneous or that the district court abused its discretion in denying the award of attorney's fees." 621 F.2d at 122 (emphasis added). In disposing briefly and without articulation of the unmeritorious contention, I do not believe that the *Nilsen* panel's cursory indication of alternative reasons for the affirmance could have been intended to enunciate any far-reaching change in the standard of review, especially when decisions cited as authority would have been decided to the contrary of the new rule. See especially *Little*, *supra*, 595 F.2d at 1006.

With regard to an attorney's personal liability under 28 U.S.C. § 1927 for excess costs resulting from his vexatious acts, the majority correctly notes that the district court's determination that particular acts were vexatious in the light of the circumstances is subject to review under the clearly erroneous standard. *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1381 (5th Cir.1979). That decision is not, of course, authority for any holding that the district court's award of the entire opponent's fee against the lawyer is subject to such standard of review. Indeed, the *Monk* panel took pains, in remanding the case, to emphasize that § 1927 provides for personal liability of the attorney only for "excess costs" occasioned by his behavior, "not for the total costs of the litigation." 599 F.2d at 1383.

Conclusion

For the reasons perhaps too fully stated, I must therefore respectfully dissent from the majority's opinion insofar as it affirms the assessment of the defendant's attorneys fees against the civil rights claim and against his lawyer who, by filing the suit, assured the claimant of his day in court.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DENNIS J. LEWIS

V. CIVIL ACTION NO. H-80-1762

BROWN & ROOT, INC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial by the Court on April 21, 1982. Plaintiff brought this action under 42 U.S.C. §2000e and 42 U.S.C. §1981, alleging that Defendant discharged him and refused to rehire him because of his race. The Court concludes that Plaintiff failed to prove that Defendant discharged him or refused to rehire him because of his race. The Court also concludes that this action may be dismissed for want of prosecution. Based on the evidence adduced at trial, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, a black male, was first employed by Defendant on November 21, 1976, as a pipefitter's helper and was subsequently discharged on December 17, 1976, for absenteeism. Between that date and August, 1979, Defendant rehired Plaintiff four times, laid him off once because of a reduction in force, and discharged him three times for cause. Plaintiff was hired again in August, 1979, as a pipefitter. Plaintiff never had an employment contract, and he was employed at the will of his employer.

2. On January 12, 1980, Plaintiff's superintendent Tom Spurgeon, a white male, saw Plaintiff and Randall Karm, a white male employee of Defendant, engaging in "horseplay" over a bicycle. The job rules provided that "horseplay" would be grounds for dismissal. Spurgeon discharged both Plaintiff and Karm.

3. Plaintiff's general foreman, Walter Taylor, told Plaintiff that he would take Plaintiff back to work after 30 days. Plaintiff went to Defendant's job site personnel office on February 12, 1980, and filled out a job application. Apparently, Taylor had either changed his mind or more likely had merely forgotten to ask the personnel office to rehire Plaintiff. On the application form, the interviewer at the personnel office noted Plaintiff's work history with Defendant. Plaintiff was told he would not be rehired. When Plaintiff protested to the personnel officer, a security officer was summoned and Plaintiff subsequently left the job site.

4. Defendant rehired Plaintiff as a part-time employee in September, 1980. Plaintiff was laid off due to a reduction in force and then rehired by Defendant on November 4, 1980. Plaintiff was discharged for insubordination on January 15, 1981, but subsequently was rehired by Defendant three times and laid off three times due to a reduction in force.

5. At the trial of this case, attorney for Plaintiff called Plaintiff as his only witness. Subsequent to cross-examination of Plaintiff, attorney for Plaintiff indicated he would have some re-direct examination and requested a recess. The Court announced a recess of 15 minutes. At the appointed time, the Court reconvened. Neither Plaintiff nor his attorney were present in the courtroom, and they could

not be found in the hallway. The Court waited approximately 15 minutes, then dismissed the case.

6. Any conclusions of law which may be deemed findings of fact are adopted as part of these findings.

Conclusions of Law

1. The Court has jurisdiction of the subject matter and parties to this action.

2. There was no evidence that Plaintiff was discharged because of his race.

3. There was no evidence that Defendant refused to rehire Plaintiff because of his race.

4. Local Rule 2, promulgated under this Court's inherent power to manage its docket, provides that attorneys shall be punctual in attendance on the Court, and shall remain in attendance while Court is in session.

5. This action is dismissed on the merits because Plaintiff offered no evidence of racial animus. This action is also dismissed for want of prosecution by Plaintiff.

6. Any findings of fact which may be deemed conclusions of law are adopted as part of these conclusions.

DONE at Houston, Texas, this 23rd day of April, 1982.

United States District Judge

APPENDIX "C"

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

DENNIS J. LEWIS

V. CIVIL ACTION NO. H-80-1762

BROWN & ROOT, INC.

FINAL JUDGMENT

Pursuant to the Court's Findings of Fact and Conclusions of Law of this date, it is

ORDERED and ADJUDGED that Plaintiff take nothing by way of this action, that this action be dismissed on the merits, and that Defendant may recover its costs.

DONE at Houston, Texas, this 23rd day of April, 1982.

United States District Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DENNIS J. LEWIS

V. CIVIL ACTION NO. H-80-1762

BROWN & ROOT, INC.

ORDER

Defendant's motion for award of attorney's fees is GRANTED. However, the affidavit of counsel is insufficient in detail to allow the Court to set a reasonable fee. Counsel is directed to submit additional information pursuant to *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).

DONE at Houston, Texas, this 14th day of June,
1982.

United States District Judge

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DENNIS J. LEWIS

V. CIVIL ACTION NO. H-80-1762

BROWN & ROOT, INC.

ORDER

In its Conclusions of Law entered on April 23, 1982, the Court concluded that Plaintiff had failed to introduce any evidence that Defendant discharged him or refused to rehire him because of his race. Mindful of the Supreme Court's admonition to resist the temptation to engage in *post-hoc* reasoning, *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421-22 (1978), the Court is persuaded that at the time Plaintiff filed his action and throughout discovery there was no evidence that racial animus played a role in Defendant's termination of Plaintiff or refusal to rehire Plaintiff. Additionally, since Plaintiff admitted becoming involved in a pushing match with Randall Karm and since Plaintiff was subsequently rehired three times by Defendant, Plaintiff failed to even make a *prima facie* showing that he was qualified for the job or that Defendant sought to hire only white employees after discharging Plaintiff. The Court finds that Plaintiff's action was frivolous, unreasonable and without foundation. *Id.* at 421.

The Court will award attorney's fees to Defendant based on the guidelines of *Johnson v. Georgia Highway*

Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

(1) Defendant's attorney submits that he spent 97.25 hours on this case, 49.75 of which were spent in drafting the pretrial memorandum and order, proposed findings and conclusions, and otherwise preparing for trial. Based upon this Court's knowledge and experience, the Court finds that 25.0 hours would have been sufficient time to complete these tasks. The Court will allow a total time and labor of 72.5 hours.

(2) The questions involved were not novel or difficult.

(3) A lawyer of average skill and ability could have performed the legal service properly.

(4) Other employment was precluded to some extent.

(5) The customary fee ranges from \$75.00 to \$175.00 depending upon the complexity of the case and the skill of counsel.

(6) The fee was fixed, not contingent.

(7) It does not appear that this case received special priority.

(8) The complaint did not specify an amount of damages or back pay.

(9) Attorney for Defendant is an associate with the Houston law firm of Vinson & Elkins, specializing in labor and employment discrimination law. Attorney for Defendant is an attorney of above average skill and ability and was clearly very well qualified to handle this case.

(10) The undesirability of the case is not a relevant factor in this case.

(11) The law firm of Vinson & Elkins has a long-standing professional relationship with Defendant.

(12) Awards in similar cases are not cited to the Court, but would be based primarily on the complexity of defending against such a suit and the skill of counsel, mindful that the purpose of an award of attorney's fees against a losing Title VII plaintiff is not to make the prevailing defendant whole, but to deter the filing of frivolous actions.

In light of this purpose and considering the guidelines, the Court concludes that Defendant may recover an attorney's fee of \$2,500.00.

In allocating liability for this fee, it is this Court's experience and judgment that plaintiffs in Title VII cases are generally unsophisticated in the law and are relying upon their counsel to advise them whether they have a cause of action that is not frivolous and unreasonable. After observing Plaintiff as a witness, the Court is certain that this Plaintiff was relying heavily on his attorney to advise him about the legal foundation for this action, after the facts had been developed during discovery. A Title VII plaintiff may, as a general proposition, be entitled to his day in court so he can attempt to prove up the facts demonstrating unlawful discrimination. But the facts offered and proved here did not demonstrate, even by inference, any unlawful discrimination. The policies underlying Title VII are not served by permitting every Title VII plaintiff a chance to tell his story in court where if all of the facts are believed there is a total lack of evidence of a prima facie case or of racial animus.

This Court is of the opinion that Plaintiff's attorney, Horace R. George, should have advised Plaintiff not to proceed to trial because of the absence of proof on these issues. While a client might insist on proceeding to trial in the face of such advice, counsel for Plaintiff in this case made no effort to offer proof on these issues, even though he might have tried to do so by calling Plaintiff's supervisors as adverse witnesses to probe their motives in firing and refusing to rehire Plaintiff. In following this course, attorney for Plaintiff unreasonably and vexatiously multiplied these proceedings. 28 U.S.C. §1927 (Supp. 1982).

It is, therefore,

ORDERED that Defendant may recover an attorney's fee in the amount of \$2,500.00, and that Plaintiff Dennis J. Lewis and his attorney Horace R. George are jointly and severally liable for that amount.

DONE at Houston, Texas, this 18th day of August, 1982.

United States District Judge

APPENDIX "F"

EXCERPTS FROM TESTIMONY OF
DENNIS J. LEWIS

A. I was looking forward to that, sir.

Q. On January, 1980, you were working as a pipe fitter for Brown & Root at the Chocolate Bayou; is that correct?

A. Yes, sir.

Q. What—when you say pipe fitter, what do you mean by that?

A. Pipe fitter is a trade or craft, one that fits pipes, fabricate pipe, read blueprints.

Q. Do you consider yourself as qualified for that job?

A. Yes, sir.

Q. What makes you qualified; what made you qualified for that particular job?

A. I went to school for it, sir.

Q. Where did you go to school?

A. I went to school at Trinidad, West Indies.

Q. How long did you go to school for that?

A. Two years.

Q. And did you work as an apprentice pipe fitter?

A. Yes, sir.

Q. Where did you work as an apprentice pipe fitter?

A. At Shell Chemical.

Q. Where is that?

A. Trinidad, West Indies.

MR. KNEPP: We don't have to do too much about this. We hired him as a pipe fitter. I'll stipulate we employed him as a pipe fitter and there is no qualification issue in the case.

Q. How much were you earning in January, 1980 at Brown & Root?

A. I was working on the regular basis of fifty hours, and salary was ten-fifty per hour.

Q. Was ten-fifty your regular pay?

A. Per hour.

Q. Ten-fifty or 10.25?

A. 10.25 may be correct.

Q. On Saturdays, were you paid time and a half?

A. Saturday is time and a half.

Q. And how much were you paid on Saturdays?

A. Time and a half is going to be 15.37, approximately.

Q. So you were earning what per week?

A. Approximately, I was taking away close to six hundred a week.

Q. Would you have been earning approximately six hundred a week from January of 1980 until you were rehired by the defendant in September 19, 1980?

A. I don't understand the question quite clearly.

Q. If you had continued working until you were rehired by the defendant in September of 1980; is that right?

A. Yes.

Q. If you had continued working, would you have been

* * *

everybody that filed the papers up, you went to this guy for the last interview. And that is the first time anybody in the Personnel Office who was making application saw the guy that was in the back unless he had some reason, because he step out from the back office to speak to me personally. He said, "Who is Dennis Lewis?" And I said, "I am."

Q. Are you trying to tell the court that you feel like Mr. Petty—

MR. KNEPP: Objection. If he is trying to tell the court that, he can tell him.

Q. Would you tell the court what you're trying to say about Mr. Petty?

A. Yes, sir. I believe that my discrimination started right there from Mr. Petty that morning on January 12.

Q. What do you mean by that?

A. On February 12, I'm sorry. Because Mr. Petty had a personal grievance against me because I went to the project manager about the van pool.

Q. What do you think Mr. Petty did?

A. I have no idea what the conversation was between him and the guy in the back. They stood [sic] in the back fifteen minutes about my application before they came out to speak to me. They locked the door.

Q. This man that you were referring to, was he superior to Mr. Petty?

A. Yes, he was.

Q. And he indicated to you that he was not going to rehire you; is that correct?

A. That is what he told me.

Q. Did he tell you anything about the thirty-day hold that was on you, supposedly?

A. He never mentioned anything like that to me.

Q. And did he mention anything about the incident

involving Mr. Karm?

A. No, he didn't mention anything. All he told me is that they are not going to replace people, they are not rehiring people who have been terminated for horseplays. They are looking to replace people. Furthermore, the project manager says not to hire me back. That was the words to me.

Q. Who was the project manager?

A. Mr. Jack Laswell.

Q. And Mr. Laswell had not promised you that you would be rehired when you were fired, did he?

A. To begin with, Mr. Laswell asked them before they terminated me to come in and speak to him and they refused to do that. They never did it.

Q. Do you feel Brown & Root was justified in terminating you January 12, 1980?

* * *

Q. When you submitted your application to Mr. Petty, after a while, weren't you told to go outside and wait?

A. No.

Q. You were never told to leave the trailer?

A. No. When that guy first came to speak to me, the first thing that came out of his mouth, "We'll not rehire you on this job and furthermore, the project manager said we'll not hire you," and in return I asked the reason and he

said, "I don't have to give you no reasons. That is all I'm telling you. We're not going to rehire you back here." So I was confused. I couldn't understand that. I was told by two people that I would be rehired and I came back and this guy didn't.

Q. But he had not told you that you would be rehired.

A. What?

Q. He never promised you that you would be rehired.

A. I never saw him before in my life, either.

Q. Do you know if he reviewed your past record with Brown & Root?

A. I don't know what he did. He didn't say anything.

Q. He didn't say anything to you about being fired several times?

A. He didn't mention anything like that to me.

Q. But he said they are not going to hire you?

A. That is all he said.

Q. And you didn't leave, did you?

A. I wanted to find out why, what the reason, and he didn't give me a reason. I was told by some other people I was going to be rehired and I wanted to know the reason.

Q. And you explained that to him?

A. I asked him to call these people and he refused to do that, also.

Q. And he asked you to leave, didn't he?

A. I did leave then. And I went to the time office.

Q. You didn't leave the project?

A. I went to the time office.

Q. But that is not leaving the project, is it?

A. He asked me to leave the personnel office and I did leave the personnel office. He didn't ask me to leave the project.

Q. At any point during your conversation with Mr. Carney—does that ring a bell?

A. Oh, yes, that rings a bell.

Q. Did you raise your voice?

A. Not at all.

Q. You never raised your voice?

A. No. I was collectible under the situation. He treated me unpolitely that day. I was very polite.

Q. Did you get mad at all?

A. When I came back and waited for Mr. Taylor, he asked me to get off completely, and I went to sit in my car.

I had another witness.

Q. At any point in the conversation with Mr. Carney, did you get mad?

A. I was laughing because I thought the whole situation was crazy.

Q. Do you remember having somebody take your deposition in this case? Do you remember a lawyer named Michael Herzik meeting with you and Mr. George and a court reported and asking you some questions?

A. Yes.

Q. And do you remember him asking you about what happened at the personnel office?

A. Yes.

Q. Do you remember being spoken to about that?

A. Yes.

Q. And did you tell him about Mr. Carney telling you if you have a problem, you can go downtown?

A. Yes.

Q. After he said that, then you got mad, didn't you?

A. I didn't get mad, but I answered him. When he told me that, hey, took that number and go downtown if you want to find out more about this situation, right then I realize the guy didn't want to give me information. I

didn't get mad, but I didn't speak to him. If that is

* * *

so I explained and just a whole mixup.

Q. He told you that he got a call and they had told him that you had created some problems up there?

A. That is what he said.

MR. KNEPP: Pass the witness.

THE COURT: Any redirect?

Are you going to have any other witnesses?

MR. GEORGE: No, sir.

May we have a recess and I can finish up after the recess?

THE COURT: How long do you expect to take with this witness?

MR. GEORGE: Shouldn't be long, fifteen or twenty minutes.

THE COURT: Let's take our noon recess at this time and be back at one-thirty.

(Noon recess 12:45 pm to 1:30 pm)

THE COURT: You may be seated.

(Plaintiff nor plaintiff's counsel are present.)

THE COURT: Defense counsel, I am going to dismiss this case on the merits. There is not one shred of evidence that there was any case of discrimination against the defendants.

The case is dismissed.

Court will be adjourned.

(Adjournment at 1:55 p.m.)

REPORTER'S CERTIFICATE

I, Clinton B. Gettig, Official Court Reporter for the United States District Court for the Southern District of Texas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth,

And I do further certify that the foregoing transcript has been prepared by me or under my direction.

/S/CLINTON B. GETTIG
CLINTON B. GETTIG
OFFICIAL COURT REPORTER
10014 U.S. COURTHOUSE
515 RUSK STREET
HOUSTON, TEXAS 77002

A-41

APPENDIX "G"

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 82-2217

D. C. Docket No. CA-H-80-1762

DENNIS J. LEWIS,

Plaintiff-Appellant,

versus

BROWN & ROOT, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

Before GEE, GARZA and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee, the costs on appeal

A-42

to be taxed by the Clerk of this Court.

AUGUST 15, 1983

TATE, Circuit Judge, concurring in part and dissenting in part.

ISSUED AS MANDATE:

APPENDIX "H"

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DENNIS J. LEWIS,
Plaintiff

CIVIL ACTION

vs.

NO. H-80-1762

BROWN & ROOT, INC.,
Defendant

NOTICE OF APPEAL

Notice is hereby given that DENNIS J. LEWIS, Plaintiff in the above styled and numbered cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment wherein the United States District Court for the Southern District of Texas, ordered, adjudged and decreed that there be judgment in favor of the Defendant, BROWN AND ROOT, INC., against Plaintiff, DENNIS J. LEWIS dismissing said Plaintiff's complaint, and signed and entered said Final Judgment on the 23 day of April, 1982.

Dated: May 18, 1982.

/S/HORACE R. GEORGE
HORACE R. GEORGE
Attorney for Plaintiff
4720 Dowling Street
Houston, Texas 77004
713-526-5505

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been forwarded by certified mail, return receipt requested to VINSON AND ELKINS, First City Tower, Houston, Texas, 77002, Attorney for Defendant on this the 19 day of May, 1982.

/S/HORACE R. GEORGE
HORACE R. GEORGE
Attorney for Plaintiff
4720 Dowling Street
Houston, Texas 77004
713-526-5505

Office - Supreme Court, U.S.
F I L E D

JAN 4 1984

ALEXANDER L. STEVAS,
CLERK

NO. 83-799

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

DENNIS J. LEWIS,
Petitioner,

v.

BROWN & ROOT, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTOPHER A. KNEPP
2938 First City Tower
Houston, Texas 77002-6760
(713) 651-2742

*Attorney for Respondent,
Brown & Root, Inc.*

Of Counsel:

VINSON & ELKINS
First City Tower
Houston, Texas 77002-6760

QUESTIONS PRESENTED

The district court and the court of appeals properly decided this case. However, for purposes of opposing further review of the issues raised in the Petition for Writ of Certiorari, Respondent submits the following restatement of the questions presented by Petitioner:

1. Whether the findings of the district court that Petitioner's action was frivolous, unreasonable and without foundation and that Petitioner's counsel unreasonably and vexatiously multiplied these proceedings are clearly erroneous.

2. Whether the district court may award attorney's fees against Petitioner and his counsel after ten days from the entry of judgment and after the filing of a notice of appeal.

3. Whether Petitioner's counsel waived his right to conduct redirect examination of Petitioner by failing to return from a fifteen minute recess that Petitioner's counsel requested.

4. Whether the district court's finding of no discrimination was clearly erroneous.

5. Whether the district court abused its discretion in dismissing Petitioner's case for want of prosecution.

6. Whether Petitioner has standing to contend bias by the district judge.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
OPINIONS IN THE COURTS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
REASONS WHY THE WRIT SHOULD BE DENIED ..	6
1. None of the Considerations Which Warrant the Supreme Court's Exercise of Discretionary Jurisdiction on Writ of Certiorari Is Met.	6
2. The Petition Merely Challenges the District Court's Findings of Fact Which Received the Concurrence of the Court of Appeals.	7
3. The Decisions of the District Court and the Court of Appeals are Correct.	9
REQUEST FOR DAMAGES AND DOUBLE COSTS	14
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDIX	1a

III

TABLE OF AUTHORITIES

CASES		Page
<i>Anthony v. Marion County General Hospital</i> , 617 F.2d 1164 (5th Cir. 1980)		13
<i>Christiansburg Garment Co. v. EEOC</i> , 434 U.S. 412 (1978)		7
<i>Graver Tank & Manufacturing Co., Inc. v. Linde Air Products Co.</i> , 336 U.S. 271, 275 (1949)		8
<i>Knighton v. Watkins</i> , 616 F.2d 795 (5th Cir. 1980)		10
<i>Lawn v. United States</i> , 355 U.S. 339 (1958)		10
<i>Lopez v. Aransas County Independent School District</i> , 570 F.2d 541 (5th Cir. 1978)		13
<i>National Hockey League v. Metropolitan Hockey Club, Inc.</i> , 427 U.S. 639, 643 (1976)		12
<i>United States v. Johnston</i> , 268 U.S. 220, 227 (1925)		8
<i>United States Postal Service Board of Governors v. Aikens</i> , ___ U.S. ___, 103 S.Ct. 1478 (1983)		11
<i>Vates v. Manale</i> , 377 F.2d 888 (5th Cir. 1967), <i>cert. denied</i> , 390 U.S. 943 (1968)		13
UNITED STATES STATUTES		
28 U.S.C. § 144		2, 13
28 U.S.C. § 1927		2, 7, 14
42 U.S.C. § 1981		3
42 U.S.C. § 2000e, <i>et seq.</i>		3
42 U.S.C. § 2000e-5(k)		2, 7
FEDERAL RULES OF CIVIL PROCEDURE		
Rule 59(e)		10
UNITED STATES SUPREME COURT RULES		
Rule 17		6
Rule 17.1(a)		7
Rule 49.2		14
Rule 50.7		14

NO. 83-799

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

DENNIS J. LEWIS,
Petitioner,

v.

BROWN & ROOT, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS IN THE COURTS BELOW

The decision of the Court of Appeals for the Fifth Circuit is reported at 711 F.2d 1287 (5th Cir. 1983). The opinion of the district court dismissing Petitioner's case on the merits and for want of prosecution is reported at 32 Fair Empl. Prac. Cas. (BNA) 1089 (S.D. Tex. 1982), and 30 Empl. Prac. Dec. (CCH) ¶ 33,040 (S.D. Tex. 1982). The opinion of the district court awarding

attorney's fees to Respondent is reported at 32 Fair Empl. Prac. Cas. (BNA) 1090 (S.D. Tex. 1982), and 30 Empl. Prac. Dec. (CCH) ¶ 33,041 (S.D. Tex. 1982).¹

STATEMENT OF JURISDICTION

Respondent adopts Petitioner's statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are of relevance:

42 U.S.C. § 2000e-5(k)

In any action or proceeding under this subchapter [Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*] the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

28 U.S.C. § 1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

1. These opinions appear as Appendix B and Appendix E, respectively, of the petition.

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

STATEMENT OF THE CASE

This is a race discrimination case filed by Petitioner, Dennis J. Lewis, against Respondent, Brown & Root, Inc.,² in which Lewis alleges that Brown & Root terminated his employment and denied him reemployment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981.

The district court, after a trial on the merits, found that Brown & Root had not discriminated against Lewis and dismissed his case. Alternatively, because Lewis and his counsel failed to return from a fifteen minute recess requested by Lewis' counsel during the trial of the case, the district court dismissed Lewis' action for want of prosecution. In addition, the district court found that Lewis' claims were so frivolous and were litigated in such an irresponsible, unreasonable and vexatious manner that

2. Brown & Root, Inc., a wholly owned subsidiary of Halliburton Company, is a Texas corporation engaged in the construction business.

Lewis and his counsel should be held jointly and severally liable for Brown & Root's attorney's fees. The court of appeals affirmed in all respects.

As the Fifth Circuit noted at the outset of its opinion, "The record in this case paints a convincing picture of the sort of civil rights action that should never have been filed." 711 F.2d at 1288. The Fifth Circuit's opinion (attached to the petition as Appendix A) contains all of the facts material to this Court's consideration of the questions presented by the petition. Consequently, these facts need not be restated here.

However, Respondent takes issue with several assertions made by Petitioner in the petition. First, Petitioner states that "at no time has he made a charge or claim that his discharge was discriminatory." (Petition at 4) Petitioner's complaint, upon which this lawsuit was tried, contains just such an allegation. (The Fifth Circuit shares Respondent's observation in this regard. 711 F.2d at 1288). Only in Petitioner's brief to the Fifth Circuit on appeal did he concede that his discharge was not discriminatory.

Second, Petitioner states that the district court took its noon recess at 12:45 p.m. until 1:30 p.m., and makes reference to the original transcript of the trial, attached to the petition as part of Appendix F. (Petition at 6) Although Petitioner later points out that the portion of the transcript to which he refers was corrected (Petition at 7), he fails to point out the manner in which the transcript was corrected and, even more egregiously, fails to append the district court's order reflecting the changes that were made. This order of the district court, and the affidavit of the court reporter incorporated therein, make

it abundantly clear that Petitioner and his counsel failed to return from the fifteen minute recess which the district court granted at the request of Petitioner's counsel. (The referenced order and affidavit are appended hereto.)

Finally, Petitioner states that prior to leaving the courtroom after the requested fifteen minute recess had been granted, "court personnel of the district court were asked to inform the district judge the plaintiff and his counsel may be a few minutes late getting back. . . ." (Petition at 6) Petitioner also asserts that he and his counsel were present in the courtroom prior to 1:00 p.m. (Petition at 6) There is no evidence in the record to support these statements. As the Fifth Circuit noted, such contentions were raised on brief and at argument but, "[s]o far as the record shows, neither Lewis nor his counsel ever appeared again after the recess." 711 F.2d at 1289.

SUMMARY OF ARGUMENT

As a review of the Fifth Circuit's opinion and the facts recited therein readily demonstrates, this case is not one which warrants the exercise of the Supreme Court's discretionary jurisdiction on writ of certiorari. None of the general considerations set forth in Supreme Court Rule 17 is met. More specifically, the Fifth Circuit's decision does not create a conflict in the circuits, or with any state court of last resort, as to any question of law. In fact, no significant question of law is presented in the petition.

In essence, the petition seeks nothing more than a further review of the district court's findings of fact and of the district court's exercise of its discretion in dismissing Petitioner's case for want of prosecution. The district court found that (1) Petitioner was not the victim of

discrimination, (2) Petitioner's case was frivolous, unreasonable and without foundation, and (3) Petitioner's counsel unreasonably and vexatiously multiplied this litigation. These findings of fact, as well as the district court's dismissal of Petitioner's case for want of prosecution, received the concurrence of the Fifth Circuit. The Supreme Court's discretionary jurisdiction on writ of certiorari should not be exercised merely to add a third layer of review of facts which already have been found in the same fashion by a federal district court and court of appeals.

REASONS WHY THE WRIT SHOULD BE DENIED

1. None of the Considerations Which Warrant the Supreme Court's Exercise of Discretionary Jurisdiction on Writ of Certiorari Is Met.

Rule 17 of the Rules of the Supreme Court of the United States sets forth general considerations indicating the character of reasons that the Court will consider in determining whether review on writ of certiorari will be granted. In the instant case, the petition for writ of certiorari raises none of these considerations, nor could it possibly do so because none of the considerations is met. The decision of the Fifth Circuit does not conflict with a decision of another federal court of appeals on the same matter, nor does it conflict with a state court of last resort on a federal question. In fact, the Fifth Circuit decided no federal question at all. As will be set forth more fully below, the Fifth Circuit merely affirmed the fact-findings of the district court and the district court's application of clear and unequivocal statutory language to the facts found.

Finally, Petitioner does not assert that the decisions of the district court or the court of appeals have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for the Supreme Court's power of supervision." Sup. Ct. R. 17.1(a). Petitioner does note, however, that this case "may have serious consequences with respect to enforcement of civil rights legislation." (Petition at 7) The fact of the matter is that this case will be of consequence only to litigants and counsel who commence, persist in, *and conduct in an irresponsible manner*, unwarranted proceedings like this one. 711 F.2d at 1292. Respondent submits that such people are few in number.

2. The Petition Merely Challenges the District Court's Findings of Fact Which Received the Concurrence of the Court of Appeals.

As indicated above, no question of federal judicial power or statutory interpretation is involved in this case. Although the petition purports to raise questions of the "power" of the district court to dismiss Petitioner's cause of action and to award attorney's fees, there really is no dispute as to the judicial authority of the district court. Section 2000e-5(k) of Title VII, as interpreted by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), unequivocally gives the district court power to award attorney's fees to a prevailing defendant. Similarly, 28 U.S.C. § 1927 clearly grants the district court authority to make Petitioner's counsel jointly and severally liable for an award of attorney's fees under the appropriate circumstances. In essence, Petitioner is challenging only the facts found by the district court which enabled it to exercise its undeniable judicial authority under Section 2000e-5(k) and Section 1927.

With respect to the merits of Petitioner's claims of race discrimination, the district court made a fact-finding that no discrimination took place. With regard to the award of attorney's fees to Respondent, the district court found that Petitioner's case was frivolous, unreasonable and without foundation, and that Petitioner's counsel unreasonably and vexatiously multiplied the proceedings. The fact-findings of the district court on the merits of Petitioner's claims as well as the district court's fact-findings regarding Respondent's entitlement to attorney's fees all received the concurrence of the court of appeals.

Under well-accepted principles of Supreme Court practice and procedure, a petition challenging findings of fact does not raise issues worthy of the Supreme Court's attention. As stated by Mr. Justice Holmes, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This is particularly true where, as here, the district court's findings received the concurrence of the court of appeals. In the words of Mr. Justice Jackson, "A court of law, such as this Court is, rather than a court for correction of errors and fact findings, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Manufacturing Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In sum, the district court undeniably had the power to dismiss Petitioner's cause of action upon a finding of no discrimination and to award attorney's fees upon findings of frivolousness, unreasonableness and vexatiousness. The district court made these findings and the court of appeals concurred. In fact, a cursory review of the Fifth

Circuit's opinion indicates that that court took an even dimmer view of these proceedings and the manner in which they were prosecuted than did the district court. In this regard, the opening line of the Fifth Circuit's opinion bears repeating: "The record in this case paints a convincing picture of the sort of civil rights action that should never have been filed." 711 F.2d at 1288.³ If the case should not have been filed, it stands to reason that it does not merit the Supreme Court's attention.

3. The Decisions of the District Court and the Court of Appeals are Correct.

With respect to the questions presented by the petition, the district court and the court of appeals properly resolved each of these issues. First, Petitioner questions the district court's findings that Petitioner's action was frivolous, unreasonable and without foundation and that Petitioner's counsel unreasonably and vexatiously multiplied these proceedings. As the district court and the court of appeals noted, the evidence offered by Petitioner did not demonstrate, even by inference, any unlawful discrimination. Petitioner "candidly and specifically attributed his discharge to the racially evenhanded enforcement of a valid rule against horseplay and the delay in his rehiring to the personal dislike borne him by a supervisor, stemming from an earlier incident between them which had nothing to do with race." 711 F.2d at 1291. In light of this evidence, and the repeated rehiring of Petitioner by Respondent after this litigation commenced,

3. Even Judge Tate, who dissented from the majority's holding on the attorney's fee award, felt that this case was "at best a marginal civil rights discrimination claim ineptly handled." 711 F.2d at 1292.

a finding that Petitioner's cause of action was frivolous is not clearly erroneous.

Similarly, given the frivolous nature of the case and the "irresponsible *manner* in which the litigation was conducted," *id.* at 1292, the district court's finding that Petitioner's counsel unreasonably and vexatiously multiplied what were from their commencement needless proceedings is not clearly erroneous.

The second issue raised by Petitioner is whether the district court had the power to award attorney's fees more than ten days after the entry of judgment and after the filing of a notice of appeal. Petitioner did not raise the ten-day limitation issue arising under Rule 59(e) of the Federal Rules of Civil Procedure before the court of appeals and thus cannot properly raise it here. *Lawn v. United States*, 355 U.S. 339 (1958).⁴ With respect to Petitioner's contention that a district court cannot award fees after a notice of appeal has been filed, it is significant that although Petitioner raised this issue in the court of appeals, the court of appeals did not feel the contention worthy of its consideration. In any event, Petitioner's argument in this respect is without merit. *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980).

The third issue raised by the petition for writ of certiorari is whether Petitioner was "allowed his day in court." The fact of the matter is that Petitioner had his day in court. Petitioner, whose case had been dismissed previously for want of prosecution, proceeded, along with his attorney, to disappear after he was cross-examined.

4. Even if the issue were properly before this Court, it has been held that a motion for attorney's fees in a civil rights case is not governed by the ten-day limitation on motions to alter or amend judgments. *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980).

Prior to the disappearance of Petitioner and his counsel, Petitioner's counsel already had advised the district court that he had no further witnesses left to call. These facts justify the Fifth Circuit's conclusions that Petitioner's counsel waived his opportunity to conduct redirect examination and that Petitioner's case on the merits was closed.

In his fourth question for review, Petitioner contends that his case should not have been dismissed because he proved a *prima facie* case. However, as this Court recently held in *United States Postal Service Board of Governors v. Aikens*, ____ U.S. ____, 103 S.Ct. 1478 (1983), the ultimate issue is one of discrimination *vel non*. In other words, regardless of any legal issues concerning the allocation of the burden of proof in employment discrimination cases, the ultimate question to be answered is whether the plaintiff was the victim of discrimination. In the instant case, the district court answered this question in the negative, and the court of appeals held that the record amply supported this finding. As discussed previously, Petitioner admitted that his discharge and the delay in his rehiring were not racially motivated. These admissions, plus the fact that Lewis was rehired by Brown & Root on several occasions following the institution of his lawsuit, amply support the district court's finding of no discrimination.

Petitioner's fifth question for review concerns the district court's dismissal of his case for want of prosecution. The facts relevant to this issue, though set forth in the Fifth Circuit's opinion, bear repeating. Early in the litigation, Lewis evidenced his disregard for the prosecution of this case by failing to appear for a properly noticed

deposition. Later, the failure of Lewis and his counsel to appear for docket call resulted in dismissal. Despite this record of inattentiveness to the litigation on the part of Lewis and his counsel, the district court reinstated the action. However, Lewis and his attorney did not learn their lesson and their failure to prosecute this case with any degree of diligence continued at the trial itself. Lewis appeared forty-five minutes late for his own trial, then, along with his counsel, inexplicably disappeared in the middle of the trial.

In the petition, Petitioner comments upon the severity of the dismissal sanction. (Petition at 15) Dismissal for want of prosecution undoubtedly is a harsh sanction, but as this Court has stated with reference to the natural tendency on the part of reviewing courts to be influenced by the severity of dismissal:

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).

The district court, in the sound exercise of its discretion, found this case to be one where the harsh sanction of dismissal was appropriate. The court of appeals affirmed, finding that dismissal for want of prosecution was not an abuse of the district court's discretion. In so holding, the Fifth Circuit merely applied the well-established

principle that "dismissal for want of prosecution is appropriate where there is a record of delay or contumacious conduct and an indication that the client knew of or participated in the attorney's failure to prosecute." 711 F.2d at 1291, citing *Anthony v. Marion County General Hospital*, 617 F.2d 1164 (5th Cir. 1980) and *Lopez v. Aransas County Independent School District*, 570 F.2d 541 (5th Cir. 1978).

Finally, Petitioner questions whether the district judge should have disqualified himself from the trial of this case. The Fifth Circuit made no mention of this point in its opinion, undoubtedly because the answer was abundantly clear. Petitioner alleged bias on the part of the district judge for the first time before the court of appeals. Consequently, he did not have standing to raise the issue as he had failed to comply with the requirements of 28 U.S.C. § 144. This statute requires a party to a proceeding in the district court to file a timely and sufficient affidavit stating that the judge before whom the matter is pending has a personal bias against him or in favor of the adverse party. The affidavit must state the facts and the reasons for the belief that bias exists "and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard. . . ." 28 U.S.C. § 144. As Lewis failed to file a timely affidavit, he was without standing in the court of appeals to contend bias by the district court. *Yates v. Manale*, 377 F.2d 888 (5th Cir. 1967), *cert. denied*, 390 U.S. 943 (1968).

REQUEST FOR DAMAGES AND DOUBLE COSTS

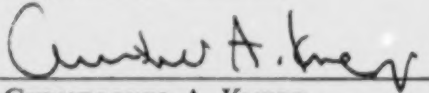
Rule 49.2 of the Rules of the Supreme Court permits the Court to award a respondent appropriate damages when a petition for writ of certiorari is frivolous. In light of the fact that the district court and court of appeals already have held this case to be frivolous, Respondent respectfully requests an award of damages equivalent to the attorney's fees incurred by Respondent in responding to this petition. Respondent also respectfully requests that an award of double costs be made pursuant to Rule 50.7.

In addition, Respondent respectfully requests that Petitioner's counsel be made jointly and severally liable for any award of fees or costs. In light of the Fifth Circuit's statement "that the entire course of proceedings was unwarranted and should never have been commenced nor persisted in," 711 F.2d at 1292, it stands to reason that the petition filed with this Court simply further multiplied what already were unreasonable, vexatious and needless proceedings. Consequently, Petitioner's counsel should be liable for the excess costs and attorney's fees occasioned by the petition. 28 U.S.C. § 1927.

CONCLUSION

The petition for writ of certiorari does not raise issues which warrant the exercise of this Court's discretionary power of review. For the most part, the petition merely challenges findings of fact made by the district court which received the concurrence of the court of appeals. Both the district court and court of appeals made it abundantly clear that the judicial system should not have had to waste its time on Petitioner's frivolous case. This case has gone far enough. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



CHRISTOPHER A. KNEPP
2938 First City Tower
Houston, Texas 77002-6760
(713) 651-2742

*Attorney for Respondent,
Brown & Root, Inc.*

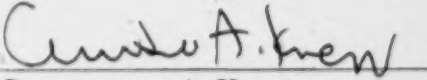
Of Counsel:

VINSON & ELKINS
First City Tower
Houston, Texas 77002-6760

CERTIFICATE OF SERVICE

On this third day of January, 1984, three true and correct copies of the above and foregoing instrument were forwarded via United States certified mail, return receipt requested, to:

Mr. Horace R. George
4720 Dowling Street
Houston, Texas 77004


CHRISTOPHER A. KNEPP

APPENDIX

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CIVIL ACTION NO. H-80-1762

[Filed January 7, 1983]

**DENNIS J. LEWIS,
Plaintiff,**

v.

**BROWN & ROOT, INC.,
Defendant.**

ORDER

Presently pending before the Court is Defendant's motion to correct the record pursuant to Rule 10(e), Fed. R. App. P. Upon reviewing the affidavits of Plaintiff and the Court Reporter, the arguments of Defendant's counsel and the Findings of Fact entered by the Court, it is apparent that there is no disagreement concerning the events which transpired on April 21, 1982.

It is, therefore,

ORDERED that the record of this case be corrected to reflect the facts stated in the affidavit of Mr. Gettig filed in this cause on January 7th, 1983.

DONE at Houston, Texas, this 7th day of January, 1983.

**/s/ ROSS N. STERLING
United States District Judge**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1762

DENNIS J. LEWIS,
Plaintiff,

v.

BROWN & ROOT, INC.,
Defendant.

AFFIDAVIT

My name is Clinton B. Gettig and I swear to the truth of the following facts:

On April 21, 1982, the above captioned case was heard before the Honorable Ross N. Sterling, and I was the Court Reporter. I kept accurate notes of the proceedings, but in keeping with my normal practice I did not record the precise time of recess and resumption of trial. Later, in attempting to assign the exact times when the rather unusual events of that day occurred, I made a mistake. Upon searching my memory, and reviewing the affidavit of Dennis J. Lewis, dated May 18, 1982, and the arguments of defense counsel submitted to the Court on October 28, 1982, I believe the Court announced a fifteen minute recess (not a noon recess) at approximately 12:20 p.m., reconvened at approximately 12:35 p.m., waited for the Plaintiff and his counsel for approximately fifteen additional minutes, and then dismissed the case at approximately 12:50 p.m.

3a

SWORN TO AND SUBSCRIBED this 5th day of
January, 1983.

/s/ CLINTON B. GETTIG
Clinton B. Gettig

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared CLINTON B. GETTIG, who, after being duly sworn, stated that he is the person named in the foregoing instrument, and that every statement or thing contained therein is true to the best of his knowledge and belief.

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, this 5th day of January, 1983.

/s/ NANCY RICKER
Notary Public in and for
Harris County, Texas.
My Commission Expires
February 8, 1984